Nos. 466 and 467

In the Supreme Court of the United States

OCTOBER TERM, 1944

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ELECTRIC POWER & LIGHT CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 166

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

No. 167

ELECTRIC POWER & LIGHT CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission (R. II, 523–672), not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 3750. The

opinion of the United States Circuit Court of Appeals for the First Circuit (R. 869–899) is reported in 141 F. (2d) 606. On April 18, 1944, that court entered an order denying the petitioners' applications for rehearing.

JURISDICTION

The judgments of the circuit court of appeals were entered March 17, 1944 (R. IV, 900–901). The petitions for writs of certiorari were filed June 16, 1944. The jurisdiction of this Court is invoked under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835; 15 U. S. C., Sec. 79x (a)) and Section 240 (a) of the Judicial Code, as amended (28 U. S. C., Sec. 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., Sec. 79, hereinafter referred to as "the Act"). The respondent's order was made under Section 11 (b) (2) of the Act (49 Stat. 803, 821, 15 U. S. C., Sec. 79k (b) (2)), which reads as follows:

> SEC. 11. * * *
>
> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each regis-

tered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated

do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

QUESTIONS PRESENTED

1. Is Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 as construed and applied by the Commission a constitutional exercise of the commerce power, free from infirmity under the due process clause or any other provision of the Constitution?

2. With respect to the application of Section 11 (b) (2) to the facts presented in this case:

(a) Did the Commission, in applying the statutory standards, properly find that the corporate structure or continued existence of the petitioners unduly complicated the structure of the Bond and Share system and caused an inequitable distribution of voting power among the security holders of that system?

(b) Assuming that such finding was correct, was the Commission warranted in concluding that liquidation and dissolution of petitioners was an appropriate remedy to ensure elimination of the statutory evils?

3. Did the Commission properly decide certain procedural questions?

4. Did the court below properly refuse to pass on certain questions not raised before the Commission?

Petitioners seek to bring all of these objections before this Court as well as urging review of the

merits of the questions not considered by the court below.

STATEMENT

The Bond and Share system consists of Electric Bond and Share Company, a registered holding company incorporated in New York, at the top; an intermediate layer consisting of five sub-holding companies including petitioners; and a great number of operating companies at the base of the pyramid, conducting utility operations in 32 states and numerous foreign countries. At each of these levels, there is a variety of senior and junior securities outstanding. (R. II, 535, 536 n. 19, 625, 626, 659, 660.)

Section 11 (b) (2) of the Public Utility Holding Company Act makes it the duty of the Commission to determine, after hearing, what steps should be taken by registered holding companies and their subsidiaries to ensure that the corporate structure or continued existence of such companies does not unduly or unnecessarily complicate the structure of the holding company system of which they are a part, or does not unfairly distribute voting power among security holders of the system. It is the policy of the Act, set forth in Section 1 (c) thereof, "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided".

After extensive public hearings, the Commission determined that the continued existence and corporate structure of petitioners unduly and unnecessarily complicated the structure of the Bond and Share system and unfairly and inequitably distributed voting power among the security holders of that system[1] (R. 11, 635). It expressed its conclusions in some detail in an opinion which dealt also with certain objections by the petitioners to the Commission's conclusions and to its procedure. The extensive opinion of the Commission (R. II, 523–649, 657–672) is of particular importance because it is in the nature of an agreed statement of the facts and issues. The opinion, before it was issued, was examined by the petitioners and they stipulated on the record that they did not desire to file briefs or to make oral argument. They agreed that the Commission might enter the opinion but reserved all legal and constitutional rights including the

[1] Section 2 (a) (9) defines "Holding-company system" as "any holding company, together with all its subsidiary companies * * * ." The system known as the "Bond and Share system" includes Bond and Share, all its subholding companies such as petitioners, and all the operating companies at the base of the pyramid. Thus, the Commission's determination as to the unwholesome effect on the Bond and Share system of the continued existence and corporate structure of petitioners, was a finding based on the relationship and function of petitioners with reference to all the companies in the system and their security holders and not (as petitioners seem to assume) merely with reference to Bond and Share itself. (Cf. Pet., No. 166, pp. 17–18.)

right to full judicial review of the findings contained in the opinion. (R. II, 522.) In preparing for the possibility of review petitioners filed petitions for rehearing (R. II, 673–676). The petitions stated that "the matters herein stated as grounds for rehearing, and respondents' contentions with respect thereto, have been fully stated in the record and are dealt with by the Commission in its said findings and opinions" (R. II, 674, 676). The Commission's opinion is thus a basic source of the facts and of the contentions of the parties raised before the Commission.[2]

The record as summarized in the opinion of the Commission (and also of the circuit court of appeals) shows that the continued existence of petitioners constitute unnecessary complication because they serve no useful purpose either functional or financial. On the contrary, they affirmatively serve an undesirable function because they were created and are used by Bond and Share as pyramiding and leverage devices to enable Bond

[2] The procedure adopted in this case was one designed toward a possible amicable conclusion of the proceedings without litigation. In fact, petitioners advised their security holders after the issuance of the order that they did not intend to seek review of the order and indicated their change of mind only on the last day on which review was permitted. These facts concerning the proceedings are of relevance in connection with the attempt of petitioners to urge before the circuit court of appeals and this Court questions not raised before the Commission.

and Share to control billions of dollars in operating companies with little or no investment.[3]

The general pattern followed by Bond and Share in developing its system through the instrumentality of subholding companies is described by the Commission, with much supporting detail, as follows (R. II, 569–571):

> * * * assets were placed on the books of the subholding companies at sums considerably in excess of their cost to Bond and Share and its associates in the particular venture (the "syndicate"); the subholding company would then issue to Bond and Share and associates senior securities (either notes or preferred stock) in a face amount more than sufficient to cover the cost of the assets turned over to the subholding company, and would also issue subtantial amounts of common stock (having a majority of total voting power) against the company's inflated investment account. Bond and Share and associates would sell to the public the senior

[3] The creation and use by Bond and Share of petitioners is a classic example of certain of the evils which it is the declared policy of the Act to eliminate, including, as specified in Clauses 1 and 3 of Section 1 (b), i. e., the evils which arise "when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies * * * or when control of such companies is exerted through disproportionately small investment."

securities plus a bonus of common stock, for the approximate face amount of the senior security, thereby recouping all cash outlays; the promoters would then be left with substantial blocks of common stock at no cash cost (sometimes indeed with a cash profit) which they would divide among themselves, the lion's share always going to Bond and Share as "manager" and promoter of the venture. Thus, Bond and Share would emerge with a substantial block of voting stock at no cost, and complete control of the new corporation (and its subsidiaries) assured through the concentrated voting strength of its common stock holdings and the execution of Bond and Share's standard "service contract" whereby Bond and Share employees "officered" the company, formed more than a majority of its board, and "took over the management of the company and its subsidiaries."

As a corollary to this method of financing the subholding companies, there also invariably resulted a serious inflation in the accounts of the operating company subsidiaries which were set up. Since the assets received at organization by the subholding companies were generally entered in their book accounts at inflated figures, they were transferred by the subholding companies to the operating companies at sums embodying at least an equivalent amount of inflation and sometimes a greatly increased amount. In this way there was passed over to the

> consumer the burden of supporting the watered capitalization of both operating company and the subholding company, while the public investors in the securities of the operating company and the subholding company who may have purchased their securities in reliance on balance sheets containing serious inflation were not informed thereof.

Although on a corporate chart the Bond and Share system consists in most cases of the top holding company, Bond and Share, sub-holding companies such as the petitioners, and at the base operating companies, this picture is in fact deceptively oversimplified for as the Commission stated (R. II, 625):

> * * * each of the major corporate units at the base of the system itself has a complex capital structure in which the principles of pyramiding and leverage are employed in very full measure. Upon each such corporate structure there is superimposed a holding company with a complex structure of its own, and in turn, upon this holding company there is superimposed still another holding company having its own unduly complex structure, a high degree of pyramiding being employed in the process of superimposition.

American and Electric interpose in each instance at least three layers of securities in the hierarchy of claims commencing with the bonds of the operating companies and leading, in inverse

order of rank, to the common stock of Bond and Share[4] (R. II, 536, 537, 543). As the Commission stated in its opinion (R. II, 626):

> * * * From an examination of these charts, it is evident that although ostensibly the system is comprised of only *three* levels, nevertheless, income derived from the basic functions of the system, namely the generation and sale of electric energy and gas, cannot reach the common stockholders of the top holding company until it has been filtered through *seven to fourteen* classes of securities having prior claims to such earnings.

The record shows that throughout their entire existence until November 1935 (the date when the registration provisions of the Act became effective), the petitioners were mere "paper" companies and did not have a single employee of their own. All officers of the petitioners were employees of Bond and Share, paid exclusively by it, and all activities performed for or in the name of the

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[4] Reference to the analysis of sources of income in the charts constituting Appendix B–2 and B–3 (R. II, 658, 659) to the Commission's opinion illustrates the complex analysis necessary to appraise the nature of the claim against ultimate operating revenues which is represented even by the various securities of petitioners. As we note below, further complications result from the dividend arrears on the preferred stock of the petitioners. Appendix B–2 to the Commission's opinion shows the effect of the complexity upon the status of security holders of Bond and Share at the apex of the pyramid (R. II, 658).

petitioners were performed by employees of Bond and Share.[5] Corporate lines and identities were wholly disregarded. There was one large organization, and that organization was Bond and Share. Functionally, all the other holding companies were, as the Commission found, mere sets of books in Bond and Share's office. (R. II, 561–563, 592.)

In November 1935, formal but unsubstantial change was effected. On the advice of counsel, the names of the sub-holding companies were lettered on the doors of a few offices of the Bond and Share office building and a handful of Bond and Share's employees together with the respective books of accounts were removed into each of the offices. Some shifting around of directorships was effected but in the practical operation of the system nothing was changed.[6] The sub-holding companies, including petitioners, remained and still

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[5] At all times more than a majority of the board of directors and executive committees of petitioners were employees and directors of Bond and Share or persons affiliated with it. Even when petitioners were engaged in dealing with Bond and Share in the purchase of assets involving hundreds of millions of dollars (transactions yielding enormous profits for Bond and Share), they were represented solely by employees and counsel for Bond and Share. (R. II, 592–595; see, e. g., R. III, 825.)

[6] Full control was retained by Bond and Share and the operations of the public utility companies of the system continued to be supervised and dominated by Bond and Share. Each of the petitioners has at the present time a staff of from 15 to 20 employees consisting in the main of

are functionless in regard to the operations of the system. (R. II, 597–598.)

Moreover, petitioners perform no financial functions in respect of the operating companies. Because of their top-heavy structures and enormous preferred dividend arrears,[7] petitioners are unable to raise any capital, and in any event the operating companies have better credit standing. (R. II, 608, 610.)

Most of the money raised by petitioners when it was still possible for them to sell securities, was used in connection with the purchase of control of existing public utility companies, and generally the transactions were so arranged that the subholding companies purchased the securities from Bond and Share at enormous profits to that company and permitted Bond and Share to retain control over a nation-wide system by using other peoples' money (R. II, 569–570).

In summary, the Commission found that "whatever may have been the situation in the past, there

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the corporate officers and a few clerical assistants which, as the Commission found, "is sufficient merely to perform necessary routine activities incident to the functioning of the subholding companies as corporate owners of securities." (R. II, 597.) In contrast, the personnel employed by the subsidiaries of American exceed 12,000, and of Electric, 14,000 (R. II, 542, 549). Clearly, as the Commission found, there was no role for petitioners to perform in regard to the operations of the public utility companies (R. II, 634).

[7] See p. 24, note 16, *infra*.

is no indication that any of the operating companies will be in a position of requiring, or that [petitioners] * * * will be in a position to furnish, any benefits in the future" (R. II, 612); and concomitant with their uselessness, the existence of the petitioners has resulted in major complication of the Bond and Share System (R. II, 626–635).

The Commission concluded that "it is indisputable that American and Electric are not only *undue* complexities but are wholly *unnecessary* ones, inasmuch as there is not now, nor has there ever been, reason or purpose for their existence except as instrumentalities through which Bond and Share is able to control their systems by a pyramiding arrangement wholly repugnant to the statute. Neither for their subsidiaries nor for their own investors do these subholding companies perform, or have they ever performed, any useful function; indeed for the latter, they entail unnecessary expense and serious complications from an investment point of view * * *" (R. II, 634).

Not only do the corporate structures and continued existence of petitioners unduly and unnecessarily complicate the structure of the holding company system involved, but also they unfairly and inequitably distribute voting power among security holders in that system. In the case of American, Bond and Share controls through it 16 public utility subsidiaries by means of an in-

vestment in voting securities which cannot be more than 3.42 percent of the total amount invested, and it controls 10 public utility subsidiaries through Electric by means of an investment in voting securities which cannot be more than 8.72 percent of the total amount invested[8] (R. II, 621,

[8] Petitioners dispute the Commission's computation and argue that no conclusion as to unfair and inequitable distribution of voting power can be reached by comparing the investment through which Bond and Share controls the system with the total amount invested in the system. They argue that comparison of Bond and Share's investment should be made only with the investment of others holding securities of the same class. However, this argument mistakes the standard set forth in the statute. Section 1 (b) (3) of the Act indicates that Congress was aiming at the evils of "control * * * exerted through disproportionately small investment." Thus Bond and Share's investment in the common stock of petitioners is the means by which it exercises complete and pervasive control over all the assets of petitioners and their subsidiaries (R. II, 614–618). The standards of the statute are applied when this investment through which control is exerted is compared with the total assets which Bond and Share controls by reason of that investment. It is irrelevant for this purpose whether the assets it controls are assets which have debt claims or equity claims against them. In considering whether the distribution of voting power finally arrived at is unfair, the Commission did not, of course, assume that percentage of voting power and percentage of investment should be equal. Rather, it assumed that there should be a weighting for greater degree of risk. See *National Power & Light Company*, 9 S. E. C. 978, 992 (1941). However, the figures mentioned above show such a lack of proportion between voting power and investment as to make it readily apparent that no possible weighting could change the fact that control was exerted "through dispro-

622, 624). These figures were reached by the Commission on an analysis of the petitioners' books themselves. Actually control is exercised by reason of an even smaller investment because the book figures are overstated by reason of large write-ups and deficient depreciation reserves.[9] (R. II, 619, 620, 622, 623.)

In the light of these findings, the Commission concluded that (R. II, 636):

> * * * it is apparent to us that appropriate action to be required of American and Electric consonant with the statute is their prompt dissolution. While some

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portionately small investment" and that the distribution of voting power was unfair and inequitable.

Petitioners criticize certain computations involving write-ups for setting off minus figures in some operating companies against plus figures in others. These computations are perfectly proper, for the task of the Commission was to determine *system investment*, which required a net figure rather than a process of equity evaluation in which all plus figures could be added and minus figures disregarded. In any event, these computations are not basic to the Commission's conclusions, which are amply supported even by the book figures *before* considering write-ups and deficient depreciation reserves (see note 9, *infra*). In addition, no complaint of these computations was made before the Commission and no assertion of any such error was made in the petition for rehearing before the Commission.

[9] Petitioners would convey the impression that it was only upon consideration of the write-ups and deficiencies in depreciation reserves, that the inequity in voting power distribution was found. The figures in the text, taken from the Commission's opinion (R. II, 621, 622, 624), show the obvious inequity on the basis of the Bond and Share system's own books, before adjustments for write-ups and depreciation deficiencies.

> measure of amelioration in their statutory offensiveness might be afforded by other approaches, in our opinion no approach presently available holds out the promise of effectuating the statute's requirements fully or promptly. * * *

The Commission's orders provided (R. II, 650–655) that the existence of both petitioners "shall be terminated" and that they "shall be dissolved." It further ordered that petitioners and Bond and Share "shall proceed with due diligence to submit to this Commission a plan or plans for the effectuation of this order, and shall take such other and further steps as may be necessary or appropriate to effectuate this order" (R. II, 651, 654).

Pursuant to Sections 11 (b) and 24 (a) petitioners sought review of the orders in the circuit court of appeals. That court unanimously sustained the orders.

DISCUSSION

(1) *The constitutionality of Section 11 (b).*— This Court has granted petitions for certiorari in *Engineers Public Service Co.* v. *Securities and Exchange Commission,* No. 16, and it has placed on its special calendar *The North American Co.* v. *Securities and Exchange Commission,* No. 1, wherein the question of the constitutionality of Section 11 (b) (1) of the Act is raised. Sections 11 (b) (1) and 11 (b) (2) present the same basic constitutional questions.

Although we believe the decision of the court below in the case at bar to be clearly correct and there is no conflict of decisions,[10] we do not oppose the granting of the writs on the constitutional questions.

(2) *Liquidation and dissolution of petitioners.*—On the basis of the record as detailed in its opinion, the Commission found that the continued existence of the petitioners unduly complicated the structure of the Bond and Share system and caused inequitable distribution of voting power among the security holders of that system. It then determined that the appropriate remedy to ensure elimination of these statutory evils was the liquidation and dissolution of the petitioners. These conclusions are questioned by petitioners.

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[10] For other cases sustaining the constitutionality of Section 11 (b) (2) see *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747 (C. C. A. 3, 1943); *Central and South West Utilities Co.* v. *S. E. C.*, 136 F. (2d) 273 (App. D. C., 1943); *In re Community Power and Light Co.*, 33 F. Supp. 901 (S. D. N. Y., 1940). In none of the cases involving the constitutionality of either Section 11 (b) (2) or Section 11 (b) (1) has any judge dissented from the holding that these sections are valid. For cases sustaining the constitutionality of Section 11 (b) (1) see *North American Company* v. *Securities and Exchange Commission*, 133 F. (2d) 148 (C. C. A. 2, 1943), certiorari granted, No. 1, this Term; *Engineers Public Service Company* v. *Securities and Exchange Commission*, 138 F. (2d) 936 (App. D. C., 1943), certiorari granted, Nos. 15 and 16, this Term; *United Gas Improvement Company* v. *Securities and Exchange Commission*, 138 F. (2d) 1010 (C. C. A. 3, 1943)

As has been briefly indicated above and more fully in the opinion of the Commission and the circuit court of appeals, the existence of petitioners and their relation to the Bond and Share system constituted prime examples of undue complexity and inequitable distribution of voting power flowing from the pyramiding of holding companies. In considering an appropriate remedy, there had to be borne in mind not only the fact that the very existence of petitioners was found to violate the standards of the Act, but also the policy of the Act "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided" (Section 1 (c)). Termination of existence and dissolution was, then, the obvious remedy called for by the Act.[11] The Court may not wish to consider the appropriateness of the remedy

[11] Petitioners (Pet., No. 166, pp. 28, 29) erroneously interpret as a congressional intent to remove dissolution as an available remedy, the fact that in Section 11 (b) (2) the language "to be reorganized or dissolved" was changed to "such steps as the Commission shall find necessary to ensure" that the statutory standards would not be violated. The legislative history contains no basis for an assertion that this change from specific to more general standards was intended to restrict rather than broaden the Commission's choice of remedies under the statute. Petitioners' arguments that Congress did not intend to provide for the elimination of public utility holding companies are based on a misreading of the legislative history, and are inconsistent with the plain meaning of Section 11 (b) (2) and Section 1 (c), which latter section also states that all the provisions of the Act shall be interpreted in accordance with its policy.

selected by the Commission. In order to indicate the basis of the Commission's decision, however, we point out that the remedy chosen was effective, complete, and well adapted to "ensure" (in the language of Section 11 (b) (2)) that the "continued existence" of petitioners would no longer offend. It was also a practical way of handling the problems, as the earlier order requiring the dissolution of National (another subholding company of Bond and Share) had indicated. As petitioners recognize (Pet., No. 166, p. 27) the order of dissolution herein is of a type entered by the Commission in a number of other proceedings.

True, a lesser remedy such as termination of Bond and Share's control would have alleviated the extent of maldistribution of voting power in the system, and brought about some simplification; but Bond and Share's control is only one factor, though an important one, in the present failure to meet the standards of Section 11 (b) (2). The continued existence of petitioners, as unnecessary complexities with burdensome and useless structures, would remain, in contravention of Section 11 (b) (2). To permit survival, it would, then, also have been necessary to endow petitioners with function and purpose, revamp their structures, confine the operations of their systems in accordance with Section 11 (b) (1), and revise their relations with their subsidiaries; in short, there would have remained practically nothing resembling American and Electric as they now exist. It is not the Commission's duty under

Section 11 (b) (2) to seek means to preserve holding companies whose dissolution is so obviously called for.[12]

The Commission was fully warranted in concluding (R. II, 636):

> It cannot be doubted that the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be beneficial to the public interest and the interest of investors and consumers; and we so find.

The Commission believes that the decision of the circuit court of appeals sustaining its position on these points is clearly correct.[13] However, since

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[12] Although it did not seem likely, the Commission indicated (R. II, 647–648) that if it should ever develop that petitioners' functions, structures, system operations, and relationships did so change as to permit their continued existence, the next-to-last sentence of Section 11 (b) (2) would afford appropriate relief. That sentence reads: "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

[13] The Commission has entered many orders under Section 11 (b) (2) of the Act. In every case in which review has been sought, the Commission's orders have been sustained by the circuit courts of appeals. *Todd* v. *S. E. C.*, 137 F. (2d) 475 (C. C. A. 6th, 1943) (International Hydro Electric System, a corporation, ordered "to liquidate and dissolve"); *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747 (C. C. A. 3d, 1943) (Commonwealth & Southern ordered to recapitalize on an all-common-stock basis); *Central and South West Utilities Co.* v. *S. E. C.*, 136 F. (2d) 273 (App. D. C. 1943) (orders requiring Central and South-

this is the first case under Section 11 (b) (2) to be presented to this Court, the Commission does not object to the granting of certiorari on these issues.[14]

3. *Procedural Questions.*—(a) Petitioners assert that the Commission erred in refusing to pass definitely on certain Section 11 (e) plans prior to entering the Section 11 (b) (2) order (Pet., No. 166, p. 25). This contention is disposed of in the Commission's opinion, in which the Commission discussed the nature of the plans and indicated that the plans, filed after the proceedings were well under way, contained no promise of altering the necessity of dissolving petitioners and also observed that the plans were too vague and indefinite to warrant holding up the dissolution orders (R. 639–647). As a procedural question, this judgment should be left to the Commission. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

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west Utilities Company and American Public Service Company, its subsidiary, to eliminate either company and recapitalize the remaining company on an all-common-stock basis). Most of the procedural points raised by petitioners herein were considered and found untenable in these cases in the circuit court of appeals. The instant cases are the first in which petitions for certiorari have been filed.

[14] *Otis & Company* v. *Securities and Exchange Commission*, before this Court on petition for certiorari; No. 81, this Term, involves merely the question of the fairness of allocation between different classes of security holders in carrying out an order of dissolution under Section 11 (b) (2). The dissolution order itself was not contested and its validity is not involved in the case pending before this Court.

(b) Petitioners assert that the Commission should have made public a report on an investigation of petitioners' systems under Section 11 (a) of the Act, prior to instituting the Section 11 (b) proceedings, and ought similarly to have first completed its proceedings under Section 11 (b) (1) of the Act. As the court below held (R. IV, 877–878), the Commission's notice of and order for hearing plainly discloses that the investigation within Section 11 (a) was in fact made (R. 27–28), and the court approved the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, to the effect that the Commission is not obliged to treat Section 11 (b) (1) problems before it enters Section 11 (b) (2) orders.

The Commission has frequently been confronted with similar arguments to the effect that it should postpone action on the matters at hand in order to engage in some other (and time-consuming) activity. These arguments, quite apart from their lack of support in the Act, are inconsistent with the direction in Section 11 (b) that the Commission make its determinations thereunder "as soon as practicable," and with the policy expressed in Section 1 (c) that it is a purpose of the Act "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided".

(c) Petitioners assert (Pet., No. 166, p. 19) that the Commission erred in not permitting the

introduction of evidence by American (though not by Electric)as to the amount of money it would cost to reproduce the properties owned by the subsidiaries of petitioners (R. II, 532).

The undisputed evidence before the Commission, briefly summarized in the statement *supra*, established undue complexity and inequitable distribution of voting power in violation of the statutory standards. In the light of such evidence the testimony offered could not have affected the fact that control of the operating companies was "exerted through disproportionately small investment," the standard fixed by Section 1 (b) (3).[15] Moreover, evidence on reproduction cost could not affect the pertinent data which the Commission had before it on earning power, showing that the operating companies were unable to earn enough on their watered capitalization to support the top-heavy holding company structures above them.[16]

[15] The offer of proof (R. I, 240–253) was to the effect that American's interest in its subsidiaries would be established at $315,500,000 on the basis of "reproduction cost" of the subsidiaries' properties (R. 251). Even if we substituted this figure for the $303,837,930 at which American's investments are valued on the books of its subsidiaries (R. II, 665), the only result would be that the computation of the extent of inequitable distribution of voting power in the system would be altered to make Bond and Share's control exercised through 3.83% of the "present value" of the system rather than the 3.42% upon which the Commission based its finding.

[16] As of December 31, 1941, the two issues of American's preferred stocks were in arrears in the amount of $35,000,000; Electric's two issues of senior preferred stock were in arrears $45,000,000 and its junior preferred stock was in arrears $5,000,000 (R. II, 537, 544).

In addition, the testimony offered, being reproduction cost evidence, was in its nature unreliable and could fairly be regarded as incompetent. Finally, even if it be assumed that such evidence would, as an abstract proposition, be of some slight relevance, the evidence was offered on the final day of two years of hearings and would have had the effect of prolonging the hearings for a period out of all proportion to its value. Since the testimony would have been ineffectual, irrelevant, incompetent and dilatory, the Commission was abundantly justified in not receiving it. The argument that the Commission should take time to listen to irrelevant evidence as to reproduction cost should be classified with petitioners' other time-consuming suggestions that instead of deciding the Section 11 (b) (2) issues the Commission should pass on vague and indefinite Section 11 (e) plans, or decide Section 11 (b) (1) issues, or start again with Section 11 (a) investigations labelled as such, or endeaver to revamp petitioners' structures and functions so that they will not be unnecessary complexities.

The argument of petitioners that the Commission, having relied upon the past history of the system, was obliged to receive reproduction cost testimony in order to find present facts, sets up a false antithesis. The history of the system showed that the petitioners have performed no substantial functions save to create undue complexities and inequitable distribution of voting

power in the system. The proffered evidence of reproduction cost was, for the reasons already stated, of no value on the issues before the Commission in this proceeding.

(d) Petitioners make certain contentions as to the form of order not passed on by the court below. They assert that the order of the Commission does not specify the "steps" which petitioners must take and that it thereby deprives petitioners of the one-year period of compliance granted by Section 11 (c) of the Act. Petitioners further assert that they are unable to comply with the orders because their companies can be technically dissolved only by a stockholders' vote. The spuriousness of these arguments is shown by the fact that a similar order (of which no review was sought) has been entered by the Commission requiring the dissolution of National Power and Light Company, another subholding company in the Bond and Share system, and National, as the records of the Commission show, has made substantial progress toward complying with such order. The general directional order, specifying the ultimate step which must be taken to comply with Section 11 but not spelling out the details, is similar to the decree entered by this Court in similar circumstances in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 187–8; and the federal courts, given power over petitioners and their assets wherever located, under Sections 11

(d) and 11 (e) of the Act, can carry out the Commission's order.

The decision of the Commission and, to the extent passed on below, of the circuit court of appeals on these procedural issues is, it is believed, clearly correct. We question whether the petitioners' contentions in these respects are of sufficient substance to warrant review by this Court.

4. *Reviewability of questions not raised before the Commission.*—The circuit court of appeals refused to pass on certain of the above objections of the petitioners because the objections were not made before the Commission. Section 24 (a) of the Act, which governs review, provides that no objection to an order of the Commission shall be considered unless it was urged before the Commission or unless reasonable grounds exist for failure to do so. The issues involved are (1) that Section 11 (b) (2) does not as a matter of statutory interpretation authorize the dissolution of subholding companies (see p. 19, note 11, *supra*); (2) the procedural questions discussed under (d), pages 26–27, *supra*.

Despite the fact that these questions were not raised before the Commission, the Commission briefed and argued them before the circuit court of appeals, and will include a discussion of them in the brief if certiorari is granted.

If this Court should conclude that the court below unduly limited the scope of review, it is submitted that this Court itself should consider the

merits of the issues not passed on by the circuit court of appeals. To remand the case for consideration of these issues by the circuit court of appeals would unduly protract this litigation. It would, moreover, doubly defeat the purpose of Section 24 (a), for petitioners would not only be able to withhold their arguments from the Commission, but in addition would further delay enforcement of the Act by having their appellate review broken up into a multiplicity of stages. Accordingly, we urge that if the Court is of the opinion that any of the contentions not passed on by the court below are properly subject to review, this Court should hear such arguments on the merits and decide them without a remand.

CONCLUSION

While believing the decision below to be correct, for the reasons stated the Commission does not oppose the granting of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

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